Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES A. GHENT, JR., Ph.D.,

Petitioner,

VS.

STATE OF NEW YORK; NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT, CARL M. DARNALL, CHIEF CLERK, *et al.*; NEW YORK STATE BOARD OF LAW EXAMINERS, JOHN E. HOLT-HARRIS, JR., CHAIRMAN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

1. Did the Federal District Court have subject-matter jurisdiction to hear the Federal Constitution and Federal Law claims contained in petitioner's complaint that were not addressed by the New York Court of Appeals? Or, were they inextricably intertwined with the petition for a waiver? *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)

2. Whether the New York Law and rules on admission of attorneys "without examination" (reciprocity) are impermissibly vague and applied unequally, in violation of Article IV, §2, ¶1, and the due process and equal protection provisions of the Fourteenth Amendment of the U.S. Constitution, and therefore violate the equal employment opportunity provisions of Title VII, 42 U.S.C. §2000e et seq.

PARTIES TO THE PROCEEDING

The parties are set forth in the caption herein. There are no corporate affiliations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reproduced in Appendix ("App.") A.

The opinion of the United States District Court for the Western District of New York is reproduced in App. B.

The determination of the State of New York Court of Appeals is reproduced in App. C.

The opinion of the United States Court of Appeals for the Second Circuit regarding rehearing is reproduced in App. D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was filed on August 21, 1998. App. A. The Court of Appeals denied a timely petition for rehearing on September 15, 1998. App. D.

The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254(1) and 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article IV, Section 2:

> (1) The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. U.S. Const. Art IV, §2, ¶1.

U.S. Constitution, Article VI, Sections 2 and 3:

> (2) This Constitution, and the Laws of the United States which shall be made in

> Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> (3) The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. U.S. Const. Art VI, §§2 and 3.

The Fourteenth Amendment of the U.S. Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend XIV, §1.

FEDERAL STATUTES

Equal rights under the law, 42 U.S.C.A. §1981:

> (a) Statement of equal rights
> All persons within the juris-diction of the

United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, codified in the Civil Rights Act of 1964, 42 U.S.C.A. §2000e, et seq. (Title VII):

Section 707

(a) Whenever the Attorney General[1] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States . .

Federal Rule of Civil Procedure 60(b)(2) and (b)(6) provides:

(b) On motion and upon such terms as are just, the court may relieve a party or party's

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[1]This provision was amended to transfer "the functions of the Attorney General under this section . . . to the Commission, . . ." P.L. 92-261, §707(c), at 128.

> legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment.

STATUTES

Judiciary Law §90, Chapter 307 of the Laws of the State of New York (matter underlined is new) provides:[2]

> b. Upon the application, pursuant to the rules of the Court of Appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the Supreme Court, if it shall be satisfied that such person <u>is currently admitted to the bar in such other jurisdiction or jurisdictions, that at least one such jurisdiction in which he is so admitted would similarly admit an attorney or counsellor-at-law admitted</u>

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[2]This provision of the Laws of the State of New York regarding the admission of attorneys to the New York State Bar without examination was provided to the petitioner on or about April 5, 1996, by the New York State Supreme Court, Appellate Division, Fourth Department. It is also contained in the petitioner's complaint, filed June 9, 1997, on page 17 of the Joint Appendix ("JA 17") and in defendant Carl M. Darnall's affidavit dated July 25, 1997, JA 62.

> to practice in New York State to its bar without examination and that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys. Such application shall be submitted to the appellate division or the supreme court in the department specified in the rules of the court of appeals.
>
> Chapter 307 takes effect on August 24, 1988. Emphasis in the original.

The New York State Court of Appeals Rules for the Admission of Attorneys and Counsellors at Law, §520.10 provides:[3]

> **520.10 Admission without examination.**
> (a) *General.* In its discretion, the Appellate Division may admit to practice without examination an applicant who:
>
> (1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; and is currently admitted to the bar in such other jurisdiction or jurisdictions, that

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[3]This was provided to the petitioner by the defendant Board of Law Examiners on or about December 18, 1995 in a publication entitled: New York State COURT OF APPEALS, Rules for the Admission of Attorneys and Counselors at Law, and, NEW YORK STATE Rules of the State Board of Law Examiners (Rev. 4/95).

> at least one such jurisdiction in which the attorney is so admitted would similarly admit an attorney or counselor-at-law admitted to practice in New York State to its bar without examination; or has been admitted to practice as an attorney and counselor-at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; . . .

STATEMENT OF THE CASE

This case includes 1) an appeal from the judgment of a U.S. Court of Appeals and 2) an appeal from an alleged decision of a New York State Court of Appeals, relative to the same issues.

The first issue involves the denial of the U.S. District Court to review the federal claims citing *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), and affirmation of that decision by the U.S. Court of Appeals. The second issue involves the New York State laws and the New York State Court of Appeals' Rules on admission of attorneys without examination (the so called reciprocity rule). This second issue challenges the constitutionality of these laws and rules based on the statute's vagueness, and its specific application to the petitioner as well as to others similarly situated. Further, this second issue poses a general challenge to the rules themselves, under the privileges and immunities clause, equal protection, due process, Title VII, and other federal statutes, and questions the validity of an alleged adjudication in the State of New York Court of Appeals regarding issues presented to the federal court.

A. Background of the decision in the U.S. Court of Appeals

On or about December 1, 1995, petitioner made a telephone inquiry to the New York Board of Law Examiners to determine whether a member of the bar in Connecticut could be considered for admission without examination (reciprocity). The tape-recorded response included Connecticut in the list of reciprocal jurisdictions.

In December 1995, petitioner, a licensed attorney in Connecticut, Massachusetts, and New Jersey, applied to be admitted to the New York bar without taking the New York State bar examination, based on that tape-recorded message. The New York statutes governing admission without examination, and upon which petitioner relied, were provided to petitioner by the defendant State Board of Law Examiners ("Board"), John E. Holt-Harris, Jr., Esq. ("Holt-Harris"), Chairman, et al., and defendant Supreme Court of New York, Appellate Division, Fourth Department ("Fourth Department"), Carl M. Darnall, Esq. ("Darnall"), Chief Clerk, et al.

The specific laws are 1) Judiciary Law §90, Chapter 307 of the Laws of the State of New York, effective August 24, 1988, provided to the petitioner by Darnall on or about April 5, 1996, and appears in Darnall's affidavit dated July 25, 1997, and in the petitioner's complaint, filed June 9, 1997. The documents appear in the Joint Appendix ("JA") at JA 62 and JA 17 respectively, *id.*, at footnote 2, page 4; and 2) the New York State Court of Appeals Rules for the Admission of Attorneys and Counsellors at Law, §520.10 (Rev. 4/95), *id.*, at footnote 3, page 5, provided to the petitioner on or about December 18, 1995 by the Board.

Subsequent correspondence between petitioner and the defendants " ... did not, however, provide any explanation for Connecticut's absence from the list dated [August 8, 1995]." App. A-4. The board thereafter advised petitioner to request the Fourth Department to consider him for admission without

examination, since his application had been initiated before Connecticut was removed as a reciprocal jurisdiction. The information from the Board regarding the date that Connecticut was removed from the reciprocal list was erroneous. App. A-4.

> On September 23, the **Appellate Division** informed Ghent [petitioner] that the **reciprocity rule was a Court of Appeals rule, not an Appellate Division rule**, and that Ghent should **request a waiver of the rule from the Court of Appeals**. App. A-4. Emphasis added.

In reality, although a Court of Appeals Rule, Rule 520.10 provides for the Appellate Division to make this determination:

> **520.10 Admission without examination.**
> (a) *General.* In its **discretion, the Appellate Division may admit to practice without examination** . . . Emphasis added.

Similar language vesting authority with the Appellate Division is contained in the State law. Yet, the Appellate Division shepherded the petitioner through the process erroneously stating that a waiver was required from the NY Court of Appeals when in fact the only thing to be gained was the potential of a waiver or a denial of the request for a waiver from the Court, which gave the Appellate Division, et al., the ability to declare that a decision had been rendered by the highest court in the state. No adjudication on the merits of petitioner's complaint was had in the New York Court of Appeals.

The NY Court of Appeals response to Petitioner's

written request was contained in a one-sentence message from the Clerk of the Court of Appeals dated December 31, 1996:

> "I am directed by the Court of Appeals to advise you that your petition in the **above-captioned proceeding**, verified October 9, 1996, has been denied." Ghent's subsequent efforts to learn the reasons for his denial were unavailing. App. A-5. Emphasis added.

The caption of the December 31st letter is as follows:

> Re: In the Matter of the Application of JAMES A. GHENT, JR. for waiver of **strict compliance with the requirements of 22 NYCRR 520.10**. Ja 37 and 82. Emphasis added.

None of the issues in the petitioner's complaint were presented to the New York Court of Appeals; and, all of those issues involve the federal constitution and/or federal law. JA 1 thru 37.

The Court of Appeals affirmed the decision of the district court:

> The district court found that the denial of Ghent's request to be admitted on motion had been a judicial action involving the **interpretation and application of §90 and §520.10 of the Rules of the Court of Appeals**. App. A-5. Emphasis added.

The authority relied on by both the U.S. Court of Appeals and the district court involves the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v.*

Feldman, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The U.S. Court of Appeals refused to consider information regarding the inconsistencies in the reciprocal jurisdiction list provided by the Fourth Department, which petitioner was able to uncover through an investigation of the requirements for admission without examination in each of the 20 jurisdictions contained on the reciprocal list of August 8, 1995. The Court stated: "An appellant cannot alter the essence of his case on appeal in order to create jurisdiction *nunc pro tunc*. *See Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996)." App. A-6. It did rule that 1) "The state proceeding was judicial", App. A-6; and 2) Ghent's challenge is to the application of the rules, not to the rules on their face." App. A-7.

Petitioner filed a timely petition for rehearing, which was denied. App. D-1,2. The Court refers to two criteria that must be met for "*Feldman* to deprive the district court of subject matter jurisdiction." App. A-6. The second states:

> Second, Ghent must be seeking review of the **particular application** of the state bar rules **to his case** rather than **review of the facial validity of those rules**. *[Feldman]* at 486. App. A-6. Emphasis added.

And on page 7, App. A-7, the Appellate court states:

> 2. Ghent's challenge is to the **application of the rules, not to the rules on their face**. App. A-7. Emphasis added.

B. Background of the decision in the U.S. District Court

The district court decided that it did not have subject matter jurisdiction, relying on *Feldman, supra,* at 485. App. B-7. In that determination, the court stated:

> Plaintiff **does not challenge the constitutionality of the "reciprocal jurisdiction" rule, but rather challenges the defendants' specific application of that rule to the plaintiff**. App. B-7. Emphasis added.

And although the dispute in this matter arose prior to the need for any consideration of the petitioner's character and fitness, the district court stated:

> Furthermore, that judicial action was reviewable within the state court context, not in Federal Court. By statute, the four **Appellate Divisions are empowered with the authority to inquire into and pass on the character and fitness of applicants for admission to the Bar**. N.Y. Judiciary Law §90 (McKinney 1993). Should the **Appellate Division determine that an applicant lacks the requisite fitness for admission to the Bar, the applicant may appeal that decision to the New York Court of Appeals**. Matter of Anonymous, 74 N.Y.2d 938 (1989). App. B-7.

REASONS FOR GRANTING THE WRIT

Point I: The District Court had Subject-Matter Jurisdiction to Hear the Claims in Petitioner's Complaint

The U.S. Court of Appeals determined that:

> Two things must be true for *Feldman* to deprive the district court of subject matter jurisdiction. First, the state proceeding for which Ghent Seeks review must be judicial, rather than "legislative, ministerial, or administrative." *Feldman,* 460 U.S. at 479; *see also Chicago v. International College of Surgeons,* _ U.S. _, 118 S.Ct. 523 (1997)(*Rooker-Feldman* does not bar review of state administrative proceed-ings). Second, Ghent must be seeking **review of the particular application of the state bar rules to his case rather than review of the facial validity of those rules**. *Id.* at 486. App. A-6. Emphasis added.

However, further in the Court of Appeals opinion it states:

> In *Feldman,* the Supreme Court held that the lower federal courts lacked subject matter jurisdiction to review state judicial decisions on the application of laws and rules **to particular parties** but that they **did have jurisdiction "over general challenges to state bar rules . . . which** do not require **review of a final state court judgment in a particular case**." *Feldman,* 460 U.S. at 486. App. A-7. Emphasis added.

In the first instance, the court states that jurisdiction must be based on the "particular application" and the second instance places jurisdiction "over general challenges."

Under either recitation of the prevailing law, petitioner must prevail. His complaint contains both.

The district court, citing *Feldman* stated:

> . . . [W]hile federal courts do exercise jurisdiction over many constitutional claims which attack a state's power to license attorneys involving challenges to either the **rule-making authority or the adminis-tration of the rules**, . . . such is **not true where review of a state court's adjudication of a particular application is sought**. The latter claim may be heard, if at all, exclusively by the Supreme Court of the United States. Id. at 485. App. B-6.

However, the section of the *Feldman* opinion which follows states:

> We have recognized that **state supreme courts** may act in a **nonjudicial capacity in promulgating rules regulating the bar**. See, e.g. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980); *Lathrop v. Donohue,* 367 U.S., at 287 (plurality opinion); *In re Summers,* 325 U.S., at 566. Challenges to the constitutionality of state bar rules, therefore, **do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding**. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, **the district court is not reviewing a state-court judicial decision**. In this regard, 28 U.S.C.

> §1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are **nonjudicial** the policies prohibiting United States district court review of final state-court judgments are not impacted. **United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case.** *Id.* at 485, 486. Emphasis added.

Petitioner's complaint contains a general challenge to the constitutionality of the State's rule on admission without examination. In the Second Count, ¶4, the complaint states:

> The actions of the defendants have selectively denied the Plaintiff, **and other attorneys licensed to practice law in Connecticut** (according to the typewritten "List of Reciprocal Jurisdictions" supplied by the Appellate Division, Fourth Department), employment opportunities in the State of New York under the provisions provided for **other attorneys from reciprocal jurisdictions to** obtain admission to and licensure to practice law in New York by motion thereby creating a **class based invidiously discriminatory animus for application of the laws in violation of plaintiff's rights secured under the Fourteenth Amendment of the U.S. Constitution, Equal Protection and Due Process clauses, 42 U.S.C. §§1981, and**

2000e, et seq. See petitioner's complaint, pages 6 & 7, JA 6,7. Emphasis added.

This Count contains a general challenge to both the rules and the rule-making authority. Arguably this could be construed as not adhering to the letter of the provision because it also includes a "particular applica[nt]" in the same paragraph.

However, such is not the case in another part of the complaint. The Third Count, ¶6 states:

> 6. The **laws are facially neutral** but **applied in an arbitrary and discriminatory manner** by the within named defendants, et al., while **administering the State's laws and rules regarding admission of attorneys from "reciprocal jurisdictions" without examination.** See petitioner's complaint, pages 8 & 9, JA 8,9. Emphasis added.

Here, the complaint alleges, in unambiguous terms, a general challenge to both the rules and the administration of the rules.

In *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), a nonresident attorney, seeking admission to the Virginia Bar on motion, brought suit in the United States District Court alleging that the residency requirement violated the privileges and immunities clause of Article IV, §2 of the Federal Constitution. Not only did the district court rule on the merits without any mention of the *Rooker-Feldman* doctrine, but the U.S. Court of Appeals concurred with the district court's decision on appeal; and, this Court Affirmed the decisions of the lower federal courts. This Court stated:

> We affirmed in *Piper* the well-settled principle

> that "`one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" [citations omitted]. ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause"). *Id.* at 65,66.
>
> The Court concluded that:
>
> A State may not discriminate against nonresidents **unless** it shows that such discrimination bears a **close relation to the achievement of substantial state objectives**. *Id.* at 70. Emphasis added.

Additional information is provided in *Friedman* regarding admission of attorneys on motion. At the time of this decision, 28 states did not allow reciprocal admission on motion. The list contains 3 States that are on New York's "List of Reciprocal Jurisdictions:" Montana, North Dakota, and Wyoming. An investigation of these states, *infra,* indicates that they are not reciprocal jurisdictions, based on New York State's Law and the Rules of the New York Court of Appeals. *Id.* at 70, *note.

Although the U.S. Court of Appeals and the District Court found that the proceeding before the New York Court of Appeals was judicial, no record of the proceeding exists. Nowhere has the Court indicated that the Title VII claims that petitioner presented in his complaint, Second Count, JA 6, 7, were properly adjudicated, or that a fair and impartial trial was provided to the petitioner, even though the petitioner alleges the lack of a fair and impartial trial, in violation of due process, in his complaint. Fourth Count, JA 10, 11.

In *Morgan v. United States,* 298 U.S. 468 (1936) this court stated:

> The Requirement of a **"full hearing"** has obvious reference to the **tradition of judicial proceedings** in which evidence is weighed by the trier of the facts. The **"hearing"** is designed to afford **the safeguard that the one who decides** shall be bound in good conscience to **consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations** which in other fields might have play in **determining purely executive action**. **The "hearing"** is the hearing of **evidence and argument**. If **one who determines the facts which underlie the order has not considered the evidence or argument, it is manifest** that the **hearing has not been given**. *Id.* at 480, 481. Emphasis added.

No evidence was presented to the NY Court of Appeals with reference to the issues in the complaint; and, no argument was had.

If the New York Court of Appeals had adjudicated the merits of petitioner's complaint, according to *McDonnell* and other authorities, it would have necessarily had to go through the procedures outlined for Title VII claims. This includes the shifting burden of proofs, with the complainant (the petitioner here) carrying the initial burden under the statute and a response from the defendants. *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802 (1973).

Since the New York Court of Appeals did no more than deny the petition for a waiver of a rule, the New York Court did not address the issues presented to the district court.

In defining the restrictions that are and are not permissible in bar admissions, the Court in *Brown v. Supreme Court of Virginia,* 590 F.Supp. 549 (1973) cited the U.S. Supreme Court's rulings in other cases:

> Judge Craven, in writing the opinion in *Keenan*, refers to Rinaldi v. Yeager, 384 U.S. 305, 309, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966), where it is stated:
>
> > "The Constitution does not require things which are different in fact . . . to be treated as though they were the same. . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have `some relevance to the purpose for which the classification is made.'" *Id.* at 557.

This Court stated in *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232, 238-239 (1957):

> A State **cannot exclude** a person from the **practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment**.[4] [citations

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[4]"We need not enter into a discussion whether the practice of law is a `right' or a `privilege.' Regardless of how the State's grant permission to

omitted] A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but **any qualification must have a rational connection with the applicant's fitness or capacity to practice law**. [citations omitted] Obviously, an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying **permissible standards, officers of a State cannot exclude an applicant when there is no basis for their findings that he fails to meet these standards, or when their action is invidiously discriminatory**. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

In *Greene v. McElroy*, 360 U.S. 474 (1959), this Court held:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonable-ness of the action depends on fact findings, **the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue**. While this is important in the case of documentary evidence, it is even more

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engage in this occupation is characterized, it is sufficient to say that a **person cannot be prevented from practicing except for valid reasons**. Certainly the practice of law is not a matter of the State's grace. Ex parte Garland, 4 Wall. 333, 379, 18 L.Ed. 366." Footnote from the text.

> important where the **evidence consists of the testimony of individuals whose memory might be faulty or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy**. *Id.* at 496. Emphasis added.

In the footnote to this passage, the Court cites Professor Wigmore's explanation of the Anglo-American law providing confrontation and cross-examination as "basic ingredients in a fair trial." *Id.* None of these provisions were provided in the alleged adjudication of petitioner's claims by the New York State Court of Appeals, et al.

In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court held that state statutes and circumstances that interfere with justice deprive a person of liberty and property without due process of law, a violation of the U.S. Constitution.

And in *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986), this Court also held that the decision of a potentially biased jurist should be vacated because the "appearance of justice" would best be served. *Id.* at 828. Reference to other leading cases on this topic was contained in the Court's opinion:

> We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison,* and *Ward.* We make clear that we are **not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "`would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true**.'" *Ward*, 409 U.S., at 60

> (quoting *Tumey v. Ohio, supra*, at 532). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, `**justice must satisfy the appearance of justice**.'" *Murchison,* 349 U.S., at 136 (citation omitted). *Id.* at 825. Emphasis added.

Based on the Court's concern, it would appear that an adjudication by any party who participated in the formulation, implementation, and evaluation of the reciprocity rule should be avoided. Please note that defendant Darnall's affidavit contains the names of specific parties who represent the judiciary in every capacity and who also were involved in the reciprocity rulemaking decisions. No clearer conflict or lack of the **"appearance of justice**" need be found to declare that any alleged adjudication by these individuals should be voided as a violation of the petitioner's due process rights, the right to a fair and impartial trial.

The Supremacy Clause of the U.S. Constitution provides that state rules or laws may not "`stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives' of the **federal law**." *Livadas v. Bradshaw,* 512 U.S. 107, (1994).

> Read narrowly, the supremacy clause binds only state judges. But other provisions of the Constitution, most notably the fourteenth amendment, directly constrain the action of all state officials, often without regard to whether state courts have ruled on the validity of officials' acts; [footnote omitted] moreover, article VI declares that "the Members of the several State legislatures, and all executive and

judicial Officers . . . of the several states, shall be bound by Oath of Affirmation, to support this Constitution . . ." Accordingly, the Court has not limited to state judges its demand for compliance with the federal Constitution. In *Cooper v. Aaron*, [358 U.S. 1 (1958).] a school desegregation case decided against the background of Governor Faubus's resistance to the desegregation of public schools in Little Rock, Arkansas, the Supreme Court asserted what is probably its broadest definition of its power: . . .it follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . . **Every state legislator and executive and judicial officer is solemnly committed by oath to support this Constitution**.'" 358 U.S. at 18. Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW, Second Edition, (Mineola, NY: The Foundation Press, Inc., 1988), 33. Emphasis added.

The applicable sections of Title VII are referred to in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976):

"It shall be an unlawful employment practice for an employer . . .

"(2) to limit, segregate, or classify his employees or **applicants for employment** in any way which would deprive or **tend to deprive** any individual of **employment opportunities** or otherwise **adversely affect his status** as an employee, because of such individual's race, color, religion, sex, or

national origin. *Id.* at 448, note 1. Emphasis added.

The Court in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973) stated: " . . . it is abundantly clear that Title VII tolerates no racial discrimination, **subtle of otherwise**." *Id.* at 411 U.S. 801. Emphasis added.

The Equal Employment Opportunity Commission (EEOC), in EEOC Decision 87-2, 1987 WL 68471 (August 31, 1987) stated:

> . . . even if the licensing agency is not an **employer** under Section 706 of Title VII, it may be covered, **nevertheless**, by **Section 707**. The language of Section 707 is clearly broader in scope than the language of 706 and **does not depend on the existence of an employment relationship or control or interference with an employment opportunity**. Emphasis added.

There is an overlap between Title VII and 42 U.S.C. §1981. Each provides a remedy for civil rights violations by private employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 466 (1975).

In *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975), this Court held that:

> The District Court's decision must therefore be measured against the purposes which inform Title VII. As the Court observed in Griggs v. Duke Power Co., 401 U.S., at 429-430, 91 S.Ct., at 853, the primary objective was a prophylactic one:

> "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 417.

> . . . "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 . . . *Id.* at 418.

These issues were properly before the U.S. District Court. The New York Court of Appeals never adjudicated these matters. Other considerations which would nullify an alleged NY Court of Appeals adjudication follow.

Point II: The Reciprocity Rule is Vague and Applied in a Discriminatory Manner

New York's reciprocity rule is clearly structured to limit admissions "without examination" and therefore is inconsistent with the equal protection, due process, the privileges and immunities clause of the Fourteenth Amendment, Article IV, §2, and Article VI, §§ 2 and 3 of the U.S. Constitution, and other federal laws.

There are four procedures and unpublished rules which allow admission to the New York Bar without examination. However, the Published rules are void for vagueness; and, the Reciprocal Jurisdiction List is conspicuously inaccurate.

The states on the reciprocal list are 1) Alaska, 2) District of Columbia, 3) Illinois, 4) Indiana, 5) Iowa, 6)

Kentucky, 7) Michigan, 8) Minnesota, 9) Missouri, 10) Montana, 11) Nebraska, 12) North Carolina, 13) North Dakota, 14) Ohio, 15) Oklahoma, 16) Pennsylvania, 17) Tennessee, 18) Virginia, 19) Wisconsin, and 20) Wyoming. Of these twenty (20) states, only 10 are reciprocal, according to both New York provisions, which have similar language.

Judiciary Law §90 defines a reciprocal jurisdiction (admission without taking the regular bar examination) as:

> . . . is currently admitted to the bar in such other jurisdiction or jurisdictions, that at least one such jurisdiction . . . would **similarly admit an attorney . . . admitted to practice in New York State to its bar without examination**. Emphasis added.

New York Court of Appeals Rule 520.10 provides:

> . . . is currently admitted to the bar in such other jurisdiction or jurisdictions, that at least one such jurisdiction . . . would **similarly admit an attorney . . . admitted to practice in New York State to its bar without examination**. Emphasis added.

Each of the states (jurisdictions) listed below do not comply with New York's Law and Rules because New York attorneys cannot be admitted without examination:

STATE

Alaska: Candidate must have passed a written examination

required by another reciprocal jurisdiction,[5] and must pass the Multistate Professional Responsibility Examination (MPRE).[6]

Kentucky: Requires passage of the MPRE

Minnesota: Requires passage of the MPRE

Missouri: Requires attendance at the Missouri Bar annual law update program or a continuing legal education program accredited by the Missouri rules

Montana: Determinations as to what examinations will be waived will be made on an individual basis

Nebraska:[7] Must attain additional educational requirements

North Carolina: Requires passage of the MPRE

North Dakota: Has a professional responsibility requirement

Ohio: Has a Code of Professional Responsibility and Judicial Conduct requirement, all as adopted by Ohio

Wyoming: Written examination requirement similar to Alaska

Fifty (50) percent of the states on the reciprocal jurisdiction list dated August 8, 1995 are **invalid**. They do not

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[5]This means that New York attorneys who were admitted without examination will not be eligible to be admitted to the jurisdiction (Alaska in this case) unless they have passed a written examination in a jurisdiction which Alaska considers reciprocal. Solely being admitted to practice in New York State is insufficient to qualify for admission to the Alaska bar without examination.

[6]The Multistate Professional Responsibility Requirement (MPRE) is one of the reasons that Connecticut is currently not considered a reciprocal jurisdiction. Connecticut, similar to Alaska and other jurisdictions, requires that candidates for admission without examination, have passed the MPRE before being admitted. The process by which states are added and removed from New York's reciprocity list is described in a memorandum contained in Darnall's answering affidavit. JA 83 thru 86.

[7]Defendant Darnall's affidavit states that Nebraska is a jurisdiction that "require[s] applicants on motion to demonstrate passage of the MPRE, . . ." JA 85.

meet the criteria established by either New York State or the State of New York Court of Appeals. Thus, defendants' consideration of these jurisdictions as reciprocal must be for other reasons, since the plain language of the statutes and rules clearly exclude these states. That is, to be a reciprocal jurisdiction, the jurisdiction must "**similarly admit an attorney . . . admitted to practice in New York State to its bar without examination**." And as the requirements of the above described jurisdictions indicate, they are not reciprocal jurisdictions by a plain reading of New York State's Laws and the New York Court of Appeals' Rules.

> As a matter of due process, a law is void on its face if it is so vague that persons "**of common intelligence must necessarily guess at its meaning and differ as to its application**."[8] See Tribe, AMERICAN CONSTITUTIONAL LAW, 1033 and footnote 3. Emphasis added.

The specific regulations regarding admission to the above referenced non-reciprocal jurisdictions are contained in Petitioner's U.S. Court of Appeals Reply Brief as Exhibits "C" thru "L."

Another Constitutional law author suggests multiple reasons for the concern over vague statutes. In Gerald Gunther and Kathleen M. Sullivan's CONSTITUTIONAL LAW, thirteenth edition, (Westbury, NY: The Foundation Press, Inc., 1997), the authors state:

> The concepts of vagueness under the First

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[8]"Connally v. General Construction Co., 269 U.S. 385, 391 (1926). See generally Note, `The Void-for-Vagueness Doctrine in the Supreme court,' 109 U.Pa.L.Rev. 67 (1960). . . ."

> Amendment draws on the procedural due process requirement of adequate notice, under which a law must convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Jordan v. DeGeorge, 341 U.S. 223 (1951). *Id.* at 1337.
>
> The requirement is not solely to provide fair notice:
>
> . . . the ban on vagueness protects not only liberty, but also **equality** and the separation of executive from legislative power through the prevention of **selective enforcement**. See Smith v. Goguen [415 U.S. 566 (1974)]: "[We] have recognized [that] the more important aspect of the vagueness doctrine `is not actual notice, but the other principal element of the doctrine - the requirement that "legislatures [set] **reasonably clear guidelines for law enforcement officials and triers of fact** in order to **prevent arbitrary and discriminatory enforcement**." ' " *Id.* Emphasis added.

Such is the situation in the instant case before this Court, where a supposedly valid reciprocity list is used to exclude applicants on an arbitrary and discriminatory standard.

The authors compare findings in First Amendment vagueness to due process vagueness. The former "typically" results in facial invalidation. On the other hand, those grounded in due process "typically are invalidated `as applied' to a particular defendant." They conclude that it could be caused by the "special concern about the **"chilling effect"** of vague statutes on protected speech." *Id.* at 1338.

In another section, the authors address licensing and the concern about administrative discretion:

> Because of concern with the risks of **abuse of discretionary authority, laws granting excessive discretion have been invalidated on their face, apart from any showing that, as applied, the discretion was in fact unconstitutionally abused and without any showing by the challenger that specific protected speech was curtailed**. *Id.* at 1339. Emphasis added.

The record speaks for itself in this case. The erroneous information provided by the within named defendants, and others, indicate an abuse of discretion which unconstitutionally prevents some bar applicants from the full protection of the laws and equal employment opportunities. The reciprocal jurisdiction list containing a 50% error is tremendously significant, since it indicates that persons charged with the responsibility of maintaining and promulgating this list, as the defendants et al., knew or should have known about these conditions. On the other hand, the reasons for these discrepancies create an alarming picture about the state of bar admissions without examination in the State of New York.

CONCLUSION

This case presents issues of significant importance, addressing fundamental Constitutional issues of a "fair trial by impartial jurors." The defendants herein, made the rules, implemented them, and enforced them. They knowingly misrepresented facts that led the petitioner through a series of processes intending to deny him and others of rights secured

under the U.S. Constitution and federal law. The adjudication of a matter by those involved since its inception does not "satisfy the appearance of justice." And as the facts are revealed here, this Court must again pronounce that all forms of discrimination are not only unlawful but unacceptable in this free society; and, that State Officials who are involved in such conduct makes the need for Court intervention more urgent.

Accordingly, petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

JAMES A. GHENT, JR.
Counsel of Record for Petitioner
445 Chili-Riga Townline Road
Churchville, New York 14428
(716) 889-7119

APPENDIX

RONY/WDNY
97-cv-6264
Telesca

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21 day of August, One thousand nine hundred ninety-eight.

PRESENT:

HON. GUIDO CALABRESI,
HON. JOSE A. CABRANES,
HON. CHESTER J. STRAUB,
Circuit Judges

FILED AUG 21 1998
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
CAROLYN CLARK CAMPBELL, CLERK

JAMES A. GHENT,
Plaintiff-Appellant

ORDER
#97-9296

v.

STATE OF NEW YORK, NEW YORK STATE SUPREME COURT, APPELLATE DIVISION FOURTH DEPARTMENT, CARL M. DARNALL, CHIEF CLERK, and NEW YORK STATE BOARD OF LAW EXAMINERS, JOHN E. HOLT-HARRIS, JR., CHAIRMAN,

Defendants-Appellees.

Appearing for Appellant: JAMES A. GHENT, Churchville, NY

Appearing for Appellee: FRANK WALSH, Assistant Attorney General, State of New York

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Western District of New York, (Michael A. Telesca, Judge), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

James Ghent appeals from the dismissal of a constellation of civil rights claims arising from the New York State court system's refusal to admit him without examination to the bar of New York. After the New York Court of Appeals denied his request for admission, Ghent filed suit for injunctive and monetary relief in the United States District Court for the Western District of New York. The district court (Telesca, J.) dismissed his suit for lack of subject matter jurisdiction. We affirm.

BACKGROUND

Ghent is an attorney licensed to practice law in Connecticut, Massachusetts, and New Jersey. In 1995, Ghent began his effort to be admitted to the bar of New York without having to take the New York state examination. Under §90(1)(b) of the New York Judiciary Law, a person allowed to practice law in other jurisdictions may be admitted to practice in New York without examination, if, among other conditions, at least one jurisdiction in which he is already a member of the bar would admit, without examination, attorneys licensed to practice in New York.

The record contains some inconsistencies regarding when and whether Connecticut was a "reciprocal Jurisdiction." Connecticut did not appear on a "List of Reciprocal Jurisdictions" dated August 8, 1995, and mailed to Ghent on May 30, 1996. Nevertheless, Ghent contends that the State Board of Law Examiners ("Board") informed him by tape-recorded message in December 1995 that Connecticut was a reciprocal jurisdiction. He therefore believed that he was eligible for admission without examination. Subsequently, in a letter dated September 11, 1996, the Board stated that Connecticut had indeed been a reciprocal jurisdiction in January 1996. The Board's letter went on to explain (erroneously) that Connecticut was removed from the list of reciprocal jurisdictions on May 17, 1996.[1] Ghent was told on May 30, 1996 that his application would be denied because he was not admitted in a reciprocal jurisdiction. (Neither party argues that New York recognizes Massachusetts or New Jersey, the other two jurisdictions in which Ghent is a member of the bar, as a reciprocal jurisdiction.)

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[1]In fact, Connecticut was removed from the list in May of 1995.

On June 11, 1996, Ghent wrote to the Board stating that he had received the list of reciprocal jurisdictions dated August 8, 1995, and he pointed out that if its contents were accurate, he had never been eligible to be admitted in New York without examination. He complained, understandably, that under those circumstances the Board should not have advised him, in its tape-recorded message in December of 1995, that Connecticut was a reciprocal jurisdiction. It was in response to this complaint that the Board wrote Ghent on September 11, 1996, erroneously stating that Connecticut had in fact been a reciprocal jurisdiction until May 17 of 1996. It did not, however, provide any explanation for Connecticut's absence from the list dated the previous August 8 or for the December 1995 tape-recorded message.

The Board advised Ghent to contact the Appellate Division and request that he be considered for admission without examination on the grounds that he had initiated his application before Connecticut's status as a reciprocal jurisdiction was revoked.[2] Ghent followed that advice on September 16, 1996. On September 23, the Appellate Division informed Ghent that the reciprocity rule was a Court of Appeals rule, not an Appellate Division rule, and that Ghent should request a waiver of the rule from the Court of Appeals.

On October 4, 1996, Ghent submitted a written petition to the Court of Appeals, setting forth the factual background of his case and requesting an order that he be admitted on motion (i.e., without examination) to the New York bar or, alternatively, that the Board refund the $400.00 application fee that he had filed in December 1995 after he had been told that

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[2]In fact, Ghent had initiated his application in December 1995, *after* Connecticut's status as a reciprocal jurisdiction was revoked in May 1995. Ghent was, however, provided with erroneous information.

Connecticut was a reciprocal jurisdiction. On December 31, 1996, the Clerk of the Court of Appeals sent the following one-sentence message to Ghent: "I am directed by the Court of Appeals to advise you that your petition in the above-captioned proceeding, verified October 9, 1996, has been denied." Ghent's subsequent efforts to learn the reasons for his denial were unavailing.

On June 9, 1997, Ghent filed a complaint against the current defendants-appellees in the United States District Court for the Western District of New York, alleging various violations of his civil rights. On September 11, 1997, the district court dismissed the action, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, which holds that lower federal courts lack jurisdiction to review state judicial decisions. *See District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). The district court found that the denial of Ghent's request to be admitted on motion had been a judicial action involving interpretation and application of §90 and §520.10 of the Court of Appeals.

The district court further noted that *Feldman*, whose facts also concerned a suit by a disappointed bar applicant, distinguished claims that a state had illegitimately denied admission to a particular applicant from challenges to a state's general rules governing admission to the bar. The Supreme Court in *Feldman* had held that the latter kind of claim, but not the former, could be brought in a lower federal court. *Feldman*, 460 U.S. at 485. According to the district court, Ghent "does not challenge the constitutionality of the `reciprocal jurisdiction' rule, but rather challenges the defendants' specific application of the rule" to him. Such an action (seeking review of a state judicial decision denying admission on motion to a particular applicant to the state bar)

is, the district court held, squarely governed by *Feldman*. It therefore dismissed the suit.

Ghent appealed the dismissal. After Ghent filed his final brief in this appeal, appellees decided to refund Ghent the $400.00 application fee he had paid two years and three months earlier.

DISCUSSION

We review *de novo* a district court's determination that Rooker-Feldman bars subject matter jurisdiction. *Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996).

Two things must be true for *Feldman* to deprive the district court of subject matter jurisdiction. First, the state proceeding for which Ghent seeks review must be judicial, rather than "legislative, ministerial, or administrative." *Feldman*, 460 U.S. at 479; *see also Chicago v. International College of Surgeons*, _ U.S. __, 118 S.Ct. 523 (1997) (*Rooker-Feldman* does not bar review of state administrative proceedings). Second, Ghent must be seeking review of the particular application of the state bar rules to his case rather than review of the facial validity of those rules. *Id.* at 486.

1. The State Proceeding was judicial

Whether a proceeding is judicial is a function not of form but of the character of the proceedings. *Feldman*, 460 U.S. at 477. We therefore examine the nature of Ghent's interaction with the New York courts. The *Feldman* court found the proceeding at issue there to be judicial, because it involved an inquiry in which "the court was called upon to investigate, declare, and enforce "liabilities as they [stood] on present or past facts and under laws supposed already to

exist." *Id.* at 479 (citation omitted). On a similar set of facts, this court has deemed judicial a proceeding in which the Appellate Division "based its decision on the unique facts of [the applicant's] case [and] did not purport to establish a rule of general application." *Campbell v. Greisberger,* 80 F.3d 703, 707 (2d Cir. 1996). In the current case, the Court of Appeals was also asked to consider Ghent's case and its particular circumstances. That, as *Feldman* and *Campbell* suggest, is a hallmark of judicial action.[3]

2. Ghent's challenge is to the application of the rules, not to the rules on their face

In *Feldman,* the Supreme Court held that the lower federal courts lacked subject matter jurisdiction to review state judicial decisions on the application of laws and rules to particular parties but that they did have jurisdiction "over general challenges to state bar rules . . . which do not require review of a final state court judgment in a particular case." *Feldman,* 460 U.S. at 486. Mere assertion of federal or constitutional claims in the context of seeking review of a particular decision does not, however, suffice to save jurisdiction. The lower federal courts "do not have jurisdiction [over] challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was

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[3]The distinction articulated in *Campbell* is between judicial and legislative actions: it does not touch on the third category, administrative actions. It thus leaves open the possibility that Ghent's proceeding was neither judicial or legislative but administrative. Ghent, however, proceeded by petition, a judicial process, to the Court of Appeals, which answered him through the Clerk of the Court, a normal channel for issuing judicial orders. And assuming -- as we must -- that the Court of Appeals considered the circumstances of Ghent's case and decided to deny his petition on the basis of that consideration, it undertook a judicial inquiry in the very sense that *Feldman* describes. *See Feldman,* 460 U.S. at 479.

unconstitutional." *Id.*

In his complaint, Ghent did not request a declaration that certain rules governing admission to the bar are unconstitutional on their face. *See Feldman,* 460 U.S. at 469 n.3, 487. He did assert constitutional and other federal grounds for his claims, but, as noted above, *Rooker-Feldman* bars constitutional claims if those claims are brought to challenge particular state judicial decisions rather than state rules or laws in general. Even Count Two of Ghent's complaint in the district court, which alleged that the defendants systematically discriminated against attorneys from Connecticut in violation of the Fourteenth Amendment and federal civil rights statutes, is grounded in the facts of Ghent's individual case and is an as-applied challenge rather than a facial one.

On appeal, Ghent does assert facial claims. He alleges, for example, that the rules for admission on motion in New York are unconstitutionally discriminatory, that the term "reciprocity" is unconstitutionally vague, and that the New York process unconstitutionally deprives applicants of impartial decision makers. The issue before us, however, is whether the district court had jurisdiction to hear the claims that Ghent brought to it, not whether the arguments he asserts here for the first time would have been sufficient to establish jurisdiction. An appellant cannot alter the essence of his case on appeal in order to create jurisdiction *nunc pro tunc. See Moccio,* 95 F.3d at 200 (declining to recognize a cause of action articulated only on appeal).

Ghent next argues that *Rooker-Feldman* does not apply when the federal claims stated in federal court were not presented in the prior state proceeding. The line of authority on which Ghent relies for this proposition rests ultimately on this court's decision in *Texaco Inc. v. Pennzoil Co.,* 784 F.2d

1133, 1143-44 (2d Cir. 1986), *rev'd on other grounds,* 481 U.S. 1 (1987). As we read *Texaco*, however, it does not support Ghent's position.

Texaco acknowledges that the exception to *Rooker Feldman* for federal claims not previously presented to a state court applies only if the federal claims are not "`inextricably intertwined' with the barred claims." *See Texaco,* 784 F.2d at 1144 (quoting *Feldman*, 460 U.S. at 482-83 n.16). The claims barred by the New York decision are only those relating to Ghent's own case. It was his own case, after all, that Ghent presented by petition to the Court of Appeals. Because Ghent is essentially pressing his particular case in federal court, his federal allegations are inextricably intertwined with the claims that are barred by the state result. His federal contentions must, then, be viewed as brought to challenge the state outcome in his particular case. It is precisely this situation that *Feldman* covered by its statement that lower federal courts do not have jurisdiction "over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Feldman,* 460 U.S. at 487. In such cases, the only recourse is by direct appeal from the state courts to the Supreme Court of the United States.

The decision of the district court is affirmed.

FOR THE COURT:

/s/ Ralph A. Anderson
Ralph A. Anderson
Acting Operations Manager

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JAMES A. GHENT, JR.,

Plaintiff(s),

JUDGMENT IN A CIVIL CASE

V.

THE STATE OF NEW YORK:
NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, FOURTH
DEPARTMENT, CARL M. DARNALL,
CHIEF CLERK; and NEW YORK STATE
BOARD OF LAW EXAMINERS,
JOHN E. HOLT-HARRIS, JR., CHAIRMAN,

Defendant(s).

CASE NUMBER: 97-CV-6264T

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That the complaint is dismissed

FILED

97 SEP 12 ... 11:05

U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

Date September 12, 1997

RODNEY C. EARLY
Clerk

/s/Jacqueline Lawrence

Jacqueline Lawrence
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JAMES A. GHENT, JR.,

Plaintiff,

97-CV-6264T

V.

THE STATE OF NEW YORK:
NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, FOURTH
DEPARTMENT, CARL M. DARNALL,
CHIEF CLERK; and NEW YORK STATE
BOARD OF LAW EXAMINERS,

DECISION and ORDER

JOHN E. HOLT-HARRIS, JR., CHAIRMAN,

Defendants.

INTRODUCTION

Plaintiff, James A. Ghent, brings this action against the State of New York and other defendants for violations of his civil rights arising out of the denial of his application for admission without examination to the New York State Bar. The defendants bring the instant motion to dismiss the complaint under Fed. R. Civ. P. 12(b) (2) for lack of personal jurisdiction over certain defendants and pursuant to Fed. R. Civ. Pro. 12 (b) (6) for failure to state a claim upon which relief can be granted. For the reasons discussed below, the defendants' motion to dismiss is granted.

BACKGROUND

Plaintiff, James A. Ghent, is an African-American attorney who is duly admitted to practice law in the States of Connecticut, New Jersey and Massachusetts. He currently resides in Churchville, New York. On December 22, 1995, Mr. Ghent applied for Admission on Motion (without examination) to the New York State Bar, submitting his application and the required $400 fee.

By letter dated January 24, 1996, the defendant New York State Board of Law Examiners (the "Board") informed the plaintiff that it would certify to the defendant Appellate Division, Fourth Department (the "Fourth Department") that plaintiff had the required legal education for admission without examination pursuant to §520.9(a) (3) of the Rules of the Court of Appeals.

Correspondence was exchanged between the plaintiff and the defendant Fourth Department regarding the plaintiff's states of admission and dates of practice in those states. A representative from the Board apparently provided Mr. Ghent with an out-dated list of reciprocal jurisdictions which listed Connecticut as an acceptable jurisdiction.

By letter dated May 30, 1996, the Fourth Department informed the plaintiff that he was not eligible for admission without examination because he was not admitted to practice in a "reciprocal jurisdiction," as required by §90 of the New York Judiciary Law. The Fourth Department included as an enclosure a "List of Reciprocal Jurisdictions", dated April of 1995. Connecticut was not on the list. Defendants contend that, although Connecticut was at one time a reciprocal jurisdiction, it was removed from the list of reciprocal jurisdictions, before plaintiff applied for admission to the New York Bar.

DISCUSSION

Plaintiff claims that defendants denial of this application for admission to the New York State Bar was a violation of his civil rights because, under his interpretation of §90 of the Judiciary Law, Connecticut was a "reciprocal jurisdiction" at the time he applied for admission in New York. Plaintiff does not dispute that New Jersey and Massachusetts have never been reciprocal jurisdictions. Thus, plaintiff argues that he should have been considered for admission in New York. He requests injunctive relief from this Court, directing that his application be considered for admission without examination. He also seeks monetary damages and attorneys' fees, as well as a refund of his $400 application fee.

Defendants argue that this case should be dismissed

under Fed. F. Civ. P. 12(b) (6) for failure to state a claim, since plaintiff had no constitutionally protected entitlement to admission to the Bar without taking the Bar examination. Further, defendants argue that the determination of admission to practice law before the courts of the State of New York without examination lies solely within the discretion of the defendant Fourth Department and, thus, this Court has no authority to grant the injunctive relief requested by the plaintiff.

Defendants also argue that no individual may be subject to respondeat superior liability under 42 U.S.C. § 1983, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), and that defendants Darnall and Holt-Harris were not personally involved, so the complaint should be dismissed as against them individually.

Defendants argue that a clerk of the court has absolute immunity and may not be held liable. Rodriguez v. Weprin, (2nd Cir. June, 1997). They argue that defendants State of New York, NYS Board of Law Examiners, and the Fourth Department also enjoy absolute immunity under the Eleventh Amendment to the United States Constitution, citing Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).

Defendants further assert that all defendants are entitled to qualified immunity since they have not violated a clearly established constitutional right of which a reasonable person should have known.

The threshold issue which must be decided is whether this court has subject matter jurisdiction to hear the plaintiff's claim. Issues of subject matter jurisdiction can be raised sua sponte at any stage of the proceedings. Fed. R. Civ. Pro. 12 (b) (1).

The United States Supreme Court, in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), has held that

> . . .there is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has denied a particular applicant admission. . . [W]hile federal courts do exercise jurisdiction over many constitutional claims which attack a state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules, ...such is not true where review of a state court's adjudication of a particular application is sought. The latter claim may be heard, if at all, exclusively by the Supreme Court of the United States.

Id. at 485.

Thus, the important issue under Feldman is whether the State's challenged action was judicial or administrative in nature. If judicial, then this Court lacks subject-matter jurisdiction to review the action, since federal district courts lack the power to exercise appellate jurisdiction over state court decisions. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

I find that the actions of the Appellate Division, Fourth Department Which are challenged by the plaintiff were judicial in nature and, thus, this Court lacks subject-matter

jurisdiction over plaintiff's claim. Plaintiff does not challenge the constitutionality of the "reciprocal jurisdiction" rule, but rather challenges the defendants' specific application of that rule to the plaintiff. Plaintiff challenges the defendants' interpretation of §90 of the Judiciary Law and §520.10 of the Rules of the Court of Appeals. Under plaintiff's interpretation of those provisions, Connecticut qualifies as a reciprocal jurisdiction. Under the defendants' interpretation, it does not. Interpretation of statutes and regulations is a judicial action.

Furthermore, that judicial action was reviewable within the state court context, not in Federal Court. By statute, the four Appellate Divisions are empowered with the authority to inquire into and pass on the character and fitness of applicants for admission to the Bar. N.Y. Judiciary Law § 90 (McKinney 1993). Should the Appellate Division determine that an applicant lacks the requisite fitness for admission to the Bar, the applicant may appeal that decision to the New York Court of Appeals. Matter of Anonymous, 74 N.Y.2d 938 (1989). Plaintiff's remedy is to challenge the denial of admission within the New York State judicial system. This Court lacks subject-matter jurisdiction to hear the plaintiff's claim. Campbell v. Greisberger, 80 F.3d 703 (2nd Cir. 1996).

CONCLUSION

Defendants having moved to dismiss the Complaint, it is hereby:

ORDERED that the motion is granted and the Complaint is dismissed for the reasons stated herein. This Court lacks subject-matter jurisdiction to hear this action.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
September 11, 1997

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

December 31, 1996

James A. Ghent, Jr., Esq.
1213 Clinton Avenue
Irvington, New Jersey 07111

Re: In the Matter of the Application of
JAMES A. GHENT, JR. for waiver of
strict compliance with the requirements
of 22 NYCRR 520.10

Dear Mr. Ghent:

I am directed by the Court of Appeals to advise you that your petition in the above-captioned proceeding, verified October 9, 1996, has been denied.

Very truly yours,

/s/ Stuart M. Cohen

Stuart M. Cohen

HBE: tab

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

WDNY/RONY
97-cv-6264
Judge Telesca

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of September one thousand nine hundred and ninety eight.

Present:

Hon. Guido Calabresi
Hon. Jose A. Cabranes
Hon. Chester J. Straub
CIRCUIT JUDGES

FILED: SEP 15 1998
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
CAROLYN CLARK CAMPBELL, CLERK

James A. Ghent, Jr., Ph.D.,
Plaintiff-Appellant

v.

Docket No. 97-9296

State of New York, et al.,

Defendants-Appellees.

A Petition for rehearing having been filed herein by appellant James A. Ghent, Jr.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
CAROLYN CLARK CAMPBELL, CLERK

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney